(2)

No. 06-1615

FILED

JUL 5 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LeBON BRUCE WALKER,

Petitioner,

v.

NEIL SELDMAN, ELIZABETH MENIST
and DIANNE STEWART,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS ELIZABETH MENIST AND DIANNE STEWART

DAVID D. HUDGINS
HUDGINS LAW FIRM
515 King Street, Suite 400
Alexandria, Virginia 22314
(703) 739-3300

Counsel for Respondents
Elizabeth Menist and
Dianne Stewart

209582

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 1

INTRODUCTION 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

I. The Court Has No Jurisdiction to Review Walker's Claims Against Menist and Stewart. 5

II. Walker Fails to Establish "Compelling Reasons" to Grant the Petition. 6

III. The Facts of This Case Do Not Constitute a "Taking" Under the Fifth Amendment. 8

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied Chemical Corp. v. Daiflon, Inc.,
449 U.S. 33, 101 S.Ct. 188 (1980) 7

Barrow v. Hill,
54 U.S. 54 (1851) 7

Bowles v. Russell,
127 S.Ct. 2360 (2007) 6

Bryant v. Jefferson Federal Savings and Loan Assn,
509 F.2d 511, 166 U.S. App. D.C. 178 (1974) ... 9

Clark v. Florida,
475 U.S. 1134, 106 S.Ct. 1784 (1986) 6

Cox v. Hart,
145 U.S. 376, 12 S.Ct. 962 (1892) 7

Moose Lodge No. 107 v. Irvis,
407 U.S. 163, 92 S.Ct. 1965,
32 L.Ed.2d 627 (1972) 9

Shelley v. Kraemer,
334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) ... 9

Spencer v. Lapsley,
61 U.S. 264, 15 L.Ed. 902 (1857) 7

Cited Authorities

Page

Valdes v. Central Altagracia,
225 U.S. 58, 32 S.Ct. 664 (1912) 7

Young v. Ridley,
309 F.Supp. 1308 (1970) 9

United States Constitution:

Fifth Amendment 8

Rules:

Supreme Court Rule 10 ..... 2, 6

Supreme Court Rule 13 6

Respondents Elizabeth Menist and Dianne Stewart, by counsel, respectfully submit that LeBon Bruce Walker's ("Walker") Petition for Writ of Certiorari should be denied, and the Court should decline to review this case.

OPINIONS BELOW

The April 13, 2006 Opinion and Order of the District of Columbia Superior Court, and the August 10, 2006 and November 3, 2006 Orders of the District of Columbia Court of Appeals are set forth in the Appendix attached to the Petition for Writ of Certiorari ("Pet. App."). It should be noted that Walker does *not* seek review of the following opinions: July 25, 2005 Order of the Superior Court of the District of Columbia; December 21, 2005 Order of the District Court of Appeals granting summary affirmance and denying Walker's petition for rehearing en banc; February 14, 2006 Order denying Walker's motion for reconsideration; April 6, 2006 Order denying Walker's motion to recall mandate (also set forth in Petitioner's Appendix).

JURISDICTION

This Court has jurisdiction to review (or decline to review) the decision of the District of Columbia Court of Appeals, No. 06-CV-479, denying Walker's petition for rehearing related to the Superior Court's Order granting Seldman's motion for cancellation and release of the notice of *lis pendes* and awarding Seldman attorneys' fees and costs. However, this Court has no jurisdiction to review the April 6, 2006 Order of the District Court of Appeals, No. 06-CV-1049, denying Walker's motion to recall the Mandate related to the trial court's dismissal of Walker's case for failure to prosecute and denial of his motion for continuance as to

respondents Menist and Stewart. Walker failed to timely file a Petition for Writ of Certiorari from that final order related to those issues.

INTRODUCTION

Walker did not timely file a petition for writ of certiorari with regard to certain issues in his appeal, and they should not be considered. Moreover, Walker has not presented "compelling reasons" for his Petition to be granted. *See* Sup. Ct. R. 10. Specifically, Walker fails to demonstrate that the decision of the District of Columbia Court of Appeals is in conflict with another United States court of appeals or with a decision by a state court of last resort, or that the D.C. Court of Appeals has decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Walker's Petition attempts to fashion a constitutional argument where none exists, and it should therefore be denied.

STATEMENT OF THE CASE

This case arises out of Walker's default on his promissory note to respondent Neil Seldman ("Seldman") securing a second mortgage on property in Washington, D.C. Respondents Elizabeth Menist ("Menist") and Dianne Stewart ("Stewart"), both attorneys, acted as substitute trustees for the Deed of Trust securing the note.

In January 2000, Seldman loaned $174,000 to Walker, who executed a Promissory Note and Deed of Trust, securing the loan with property he owned at 1922 3rd Street, N.W., Washington, D.C. After Walker was incarcerated some time in 2001, he defaulted on the loan. With proper notice to

Walker, Seldman foreclosed on the secured property through the substitute trustees, Menist and Stewart. Walker contended that the foreclosure was "illegal" since he was not afforded his right to cure the default pursuant to D.C. statutory law (Pet. at p. 5).

Walker initially filed a Complaint on May 12, 2003 in the Superior Court of the District of Columbia, Civil Action No. 03-3882, in an action entitled *LeBon Bruce Walker v. Neil Seldman, Barry Mitchell, Bruce Mitchell, Elizabeth Menist, Dianne Stewart, and Carole McIntyre*. The Superior Court complaint alleged wrongful foreclosure, breach of contract, fraud and sought compensatory and punitive damages. Trial was scheduled for April 25, 2005 on the *sole* issue: "was the property in question Plaintiff's [Walker's] personal residence for purposes of his statutory right of redemption after he defaulted on his mortgage" (Pet. App at 22a, n. 3). Seldman, Menist and Stewart moved to dismiss the case in its entirety on grounds that Walker could not state a claim, and for his failure to prosecute the case. On the day of trial, Walker sought a continuance, as his attorney was suspended from the practice of law and he had not retained substitute counsel. The court denied Walker's motion for a continuance and gave Walker a choice: proceed without counsel over objection, thus preserving the issue of whether he should have been entitled to counsel, or elect not to proceed. Walker elected not to proceed with the trial, and the court granted Seldman, Menist and Stewart's motion to dismiss for failure to prosecute (Pet. App. at 18a – 25a).

On May 4, 2005, Walker moved for reconsideration of the dismissal order. A week later, on May 11, 2005, Seldman filed a motion for cancellation and release of notice of *lis pendes* and for attorneys' fees and costs. By Order dated

July 25, 2007, the court denied Walker's motion for reconsideration, and deferred ruling on Seldman's motion for cancellation and release of the notice of *lis pendes* and for fees and costs until the time for appeal expired (Pet. App. at 18a – 25a).

Walker filed an appeal in the District of Columbia Court of Appeals, No. 06-CV-1049, challenging the Superior Court's discretion in denying his oral motion for continuance and dismissing his case for want of prosecution when he chose not to proceed with the trial ("First Appeal"). On December 21, 2005, the Court of Appeals granted summary affirmance of the Superior Court's ruling and denied Walker's motion for summary reversal and his petition for rehearing *en banc* (Pet. App. at 9a-10a). Walker's motion for reconsideration of the December 21, 2005 order was denied on February 14, 2006 (Pet. App. at 7a-8a). The Court of Appeals issued its Mandate on February 23, 2006, and denied Walker's motion to recall the mandate on April 6, 2006 (Pet. App. at 11a).[1]

Once the Mandate was affirmed, the Superior Court granted Seldman's motion for cancellation and release of the notice of *lis pendes* and for fees and costs by its Order dated April 13, 2006 (Pet. App. at 12a-17a). Walker then filed another appeal in the District of Columbia Court of Appeals, No. 06-CV-479, related to the Order to release the notice of *lis pendes* and the award of attorneys' fees and costs ("Second Appeal"). Respondents Menist and Stewart were not parties

1. On March 31, 2006, Walker filed an identical action against Seldman, Menist and Stewart in the U.S. District Court for the District of Columbia Case No.: 1:06CV00603. Defendants' motions to dismiss were granted, and Walker has appealed this decision as well. *See Walker v. Seldman*, 471 F.Supp.2d 106 (D.C. Cir. 2007).

to the Second Appeal. On August 10, 2006 the D.C. Court of Appeals issued a Judgment Order granting Seldman's motion for summary affirmance (Pet. App. at 5a-6a). Walker then filed a Petition for Rehearing, which was denied on November 3, 2006 (Pet. App. at 3a – 4a). The Mandate, due to issue on November 10, 2006, was stayed on November 16, 2006 pending Walker's present application for a writ of certiorari before this Court (Pet. App. at 1a – 2a).

REASONS FOR DENYING THE PETITION

I. The Court Has No Jurisdiction to Review Walker's Claims Against Menist and Stewart.

As noted above, Walker filed two appeals. The final decision of the first appeal on the issue of whether the court abused its discretion in dismissing his case for failure to prosecute is the Court of Appeal's Order dated April 6, 2006 (Pet. App. at 11a). The only subsequent continuation of the case is related to Seldman's motion to release the notice of *lis pendes* and for attorneys' fees and costs, which is the subject of the Second Appeal. Menist and Stewart are not parties to the Second Appeal. The final decision in the Second Appeal, the Order of November 3, 2006 denying Walker's Petition for Rehearing or Rehearing *En Banc*, is the one that is the subject of this Petition for Writ of Certiorari (Pet. at p. 16).

It was only after Walker exhausted all appeals on the issue of the dismissal of his case for want of prosecution that the Superior Court would consider Seldman's motions related to the *lis pendes* and fees (Pet. App. at 25a). The Order of April 13, 2006 granting Seldman's motions stated, "[t]here has now been entered a final judgment of dismissal, and

Plaintiff [Walker] has exhausted all rights of appeal" (Pet. App. at 14a). Thus, the time for filing a Petition for Writ of Certiorari began to run from the date of the final order, April 6, 2006. Walker's Petition filed on February 1, 2007 was not within the 90-day requirement and is thus untimely. Sup.Ct. R. 13(1). This Court should decline to review this Petition as to Menist and Stewart for want of jurisdiction. *See, e.g. Bowles v. Russell*, 127 S.Ct. 2360 (2007); *Clark v. Florida*, 475 U.S. 1134, 106 S.Ct. 1784 (1986).

II. Walker Fails to Establish "Compelling Reasons" to Grant the Petition.

In exercising judicial discretion on whether to review a writ of certiorari, this Court considers a number of reasons characterizing the petition, none of which are applicable here. The reasons for review outlined in Supreme Court Rule 10 read as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Walker cites to no case in conflict with another, or to a court that has decided an important federal question. The Superior Court, in this instance, dismissed Walker's case for his failure to prosecute his case pursuant to Super. Ct. Civ. R. 41(b)(Pet. App. at 23a). Historically, discretionary decisions by a trial court related to granting a continuance are not reviewable on appeal. *See, e.g. Valdes v. Central Altagracia*, 225 U.S. 58, 32 S.Ct. 664 (1912); *Cox v. Hart*, 145 U.S. 376, 12 S.Ct. 962 (1892); *Spencer v. Lapsley*, 61 U.S. 264, 15 L.Ed. 902 (1857); *Barrow v. Hill*, 54 U.S. 54 (1851). Similarly, this court has ruled that the authority to grant a new trial was strictly an exercise of discretion for the trial court and not reviewable. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980). This standard procedural decision by a trial court exercising its sound discretion should not be subject to a constitutional challenge manufactured by Walker because he is unhappy with the trial court's decision.

III. The Facts of This Case Do Not Constitute a "Taking" Under the Fifth Amendment.

Initially, the arguments raised in Walker's Petition for Writ of Certiorari are novel and were not raised in the courts below. For this reason alone, they should not be considered. Additionally, the trial court never reached the merits of the claim as to whether the property at issue was residential, such that Walker had a right to cure the default. As such, Walker's argument regarding his statutory right of redemption cannot be considered on review as requested in his Petition.

Assuming *arguendo* that Walker preserved his constitutional arguments, they still must fail. Walker seeks to convince the Court that a civil action over his default on a promissory note wherein his property was properly foreclosed upon is a "taking" subject to Fifth Amendment protections entitling him to an "absolute right to counsel" (Pet. at pp. i, 16-20).

In the case below, Seldman exercised his rights pursuant to D.C. Code §42-815 to foreclose on the property securing his promissory note with Walker when Walker defaulted on the note. There is no claim that Seldman did not provide the requisite statutory notices prior to foreclosure. Statutes such as the District of Columbia's foreclosure statute are routinely upheld. In *Honeyman v. Hanan*, the Supreme Court stated, "[t]he Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided." *Honeyman v. Hanan*, 302 U.S. 375, 378, 58 S.Ct.273, 274, 82 L.Ed. 312 (1937). Recognizing the right of private

individuals to contract, District of Columbia statutes governing foreclosure procedures do not on their face violate due process clause of Fifth Amendment. *Bryant v. Jefferson Federal Savings and Loan Assn*, 509 F.2d 511, 166 U.S. App. D.C. 178 (1974).

The Fifth Amendment, cited by Walker in his Petition, is inapposite to the case at hand (Pet. at p. 2). Walker was not deprived of his property without due process of law, nor was his private property taken for public use without just compensation. As stated in *Bryant*, *supra*, the due process clause is a limitation on governmental, not private, action. *Id.*, 509 F.2d at 513, 166 U.S. App. D.C. at 180, *citing Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Where there is no evidence of significant governmental involvement, and where the agreement at issue is a private consensual agreement, the court should decline to review Walker's petition. *See*, *e.g. Young v. Ridley*, 309 F.Supp. 1308 (1970).

To the extent that Walker claims that the court below had an obligation to assign counsel, his argument has no merit. The court never ruled that Walker did not have a right to counsel; rather, it dismissed the case for his failure to prosecute after much consideration (Pet. App. At 18a – 25a). In this civil matter involving a property dispute, the court had no obligation to appoint counsel of the expense of the District of Columbia.

As further grounds for denial of the Petition, Menist and Stewart incorporate the arguments of respondent Neil Seldman in his Brief in Opposition, as if fully set forth herein.

CONCLUSION

Walker's effort to fashion a Constitutional claim from a routine foreclosure proceeding is not warranted under the circumstances of this case. Walker has no jurisdiction to seek review of the Superior Court's Orders regarding the dismissal of his case, and he has not established any compelling reasons for this Court to grant the Petition. Therefore, respondents Menist and Stewart respectfully request that the Petition be denied.

Respectfully submitted,

DAVID D. HUDGINS
HUDGINS LAW FIRM
515 King Street, Suite 400
Alexandria, Virginia 22314
(703) 739-3300

Counsel for Respondents
Elizabeth Menist and
Dianne Stewart